Supreme Court, U.S.
FILED
OCT 13 2000
CLERK

(2)

No. 00-409

In The
Supreme Court of the United States

LEVON HOPKINS,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

12 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(b) of the Rules of the Supreme Court of the United States, Respondent United Parcel Service, Inc. respectfully submits this Corporate Disclosure Statement.

United Parcel Service, Inc., Respondent, is an Ohio corporation which is a wholly-owned indirect subsidiary of United Parcel Service, Inc., a Delaware corporation. United Parcel Service, Inc., a Delaware corporation, is a publicly held corporation.

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JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for a writ of certiorari "only for compelling reasons." According to Rule 10, subparagraphs (b) and (c), "compelling reasons" include if a state court of last resort (1) decides an important federal question in a way that conflicts with decisions of courts of appeal or another state court of last resort; (2) decides an important federal question that conflicts with relevant decisions of this Court; or (3) decides "an important federal question that has not been, but should be, settled by this Court . . . ."

Petitioner has not and cannot set forth compelling reasons to justify the exercise of this Court's discretionary jurisdiction. First, the decision of the Ohio First District Court of Appeals ("Court of Appeals") leading to this petition is unpublished and therefore is not binding beyond this current action. See, Rule 2, Ohio Supreme Court rules for the Reporting of Opinions. Second, the Court of Appeals' decision does not conflict in any way with federal law. The petition should therefore be denied.

STATEMENT OF THE CASE

On May 3, 1996, Petitioner was discharged from his position as a "Feeder Driver" for United Parcel Service, Inc. ("UPS") for having three avoidable accidents within five months while driving a 68,000 pound UPS tractor trailer full of packages along public roadways from one UPS facility to another.

Pursuant to the terms of the Collective Bargaining Agreement ("Agreement") between Petitioner's union, the International Brotherhood of Teamsters, Local 100 ("Union") and UPS, Mr. Hopkins protested his discharge and filed a grievance with his Union. Under the terms of the Agreement, UPS and Union representatives met in an attempt to resolve the matter at the local level. The local grievance panel was unable to reach a consensus on Petitioner's grievance so the matter was sent before the Ohio Joint State Committee ("OJSC"). Mr. Hopkins' grievance "protesting his unfair discharge" was heard by the OJSC arbitration panel on May 13, 1996. At the hearing, the Union presented its case on behalf of Petitioner. Petitioner was given the opportunity to explain his position to the panel. It is undisputed that the Union and Mr. Hopkins decided not to raise any race discrimination claim at the hearing. The OJSC panel, comprised equally of Union and UPS representatives, reached a consensus. It upheld Petitioner's discharge for just cause. Pursuant to the terms of the Agreement, the decision of the OJSC panel was final and binding upon the parties.

On January 30, 1998, Mr. Hopkins filed a Complaint in U.S. District Court for the Southern District of Ohio ("District Court"), alleging that he had been discharged because of his race in violation of federal and state law. On January 19, 1999, the District Court granted UPS's motion for summary judgment on the federal claim on the grounds

that the claim was untimely and dismissed the state law claim without prejudice.[1] Mr. Hopkins then filed a lawsuit in the Hamilton County Court of Common Pleas ("Trial Court") instituting the current action.

The Trial Court granted UPS's Motion for Summary Judgment. One of the reasons for this holding was the fact that Mr. Hopkins' discharge had been found to be for just cause in his arbitration, which barred a civil action under ORC § 4112.14(C). Significantly, Mr. Hopkins did not raise either of the questions presented to this Court in the Trial Court.

The Court of Appeals for the First Appellate District of Ohio ("Court of Appeals") affirmed the Trial Court's decision, holding that the language of ORC § 4112.14(C) applies to discharge claims in which race discrimination is alleged. As was the case in the Trial Court, Petitioner failed to raise the issues presented in this Court to the Court of Appeals.

On June 14, 2000, the Ohio Supreme Court summarily rejected Petitioner's request to accept jurisdiction in this case, dismissing the appeal "as not involving any substantial constitutional question." In his Memorandum in Support of Jurisdiction before the Ohio Supreme Court, Petitioner argued for the first time that UPS's interpretation of Ohio Revised Code § 4112.14(C) should be rejected because such an interpretation would violate Federal law.

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[1] In an unpublished opinion, the Sixth Circuit Court of Appeals affirmed the District Court's dismissal of Hopkins' Title VII claim on the basis that it had not been timely filed. Hopkins v. United Parcel Service, 221 F.3d 1334, 2000 WL 923458 (6th Cir. (Ohio) 2000).

ARGUMENT

I. HOPKINS FORFEITED THE ARGUMENTS RAISED IN THIS COURT BY FAILING TO RAISE THEM IN EITHER THE TRIAL COURT OR THE COURT OF APPEALS.

The only pertinent issue in this case which was raised before or considered by either the Trial Court or the Ohio Court of Appeals was whether Ohio Revised Code ("ORC") § 4112.14, on its face, barred Petitioner's state law race discrimination claim. As an afterthought, Petitioner first raised the current issues in his Memorandum in Support of Jurisdiction before the Ohio Supreme Court.

Absent exceptional circumstances, black letter law dictates that a party forfeits an argument by failing to raise it at the trial court level. See, e.g., Hormel v. Helvering, 312 U.S. 552, 556 (1941). The concurrence in Freytag v. Commissioner, 501 U.S. 868 (1991), provides a clear rationale for forfeiture principles:

> These rules reflect the principle that a trial on the merits . . . is the "main event," and not simply a "tryout on the road" to appellate review. The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance.

Id. at 895 (citations omitted).

This rationale is particularly persuasive here, where the case was decided as a matter of law via summary judgment. As the Tenth Circuit Court of Appeals stated in Tele-Communications, Inc. v. C.I.R., 104 F.3d 1229 (10th

Cir. 1997),

> This rule is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories . . . . In order to preserve the integrity of the appellate structure, we should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to "give it everything they've got" at the trial level.

Id. at 1232-33.

Petitioner has no excuse for not having raised the arguments presented here before the Trial Court or Court of Appeals. The Petition for Writ of Certiorari should be denied for this reason alone.

II. FEDERAL LAW DOES NOT PRE-EMPT ORC § 4112.14(C).

Pre-emption of state law by federal law "is not to be lightly presumed," and may only occur under three scenarios. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987). First, Congress may pre-empt state law by so stating expressly. Id. at 280. Second, Congress may pre-empt inferentially, where a scheme of federal regulation demonstrates that Congress left no room for state regulation. Id. at 281. Because Congress never expressly or inferentially declared an intent to pre-empt state employment discrimination law, neither of these arguments applies here.

State law may also be pre-empted by federal law "to the extent it conflicts with federal law." Id. at 281. Petitioner argues that ORC § 4112.14(C) should be pre-empted on this basis. He is wrong.

Certainly, ORC § 4112.14(C) is not pre-empted by Title VII. In the two sections of the 1964 Civil Rights Act set forth below, Congress stated that state anti-discrimination laws will only be pre-empted if the statutes require action which violates Title VII:

> Nothing in this title shall be deemed to exempt or relieve any person from any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7 (emphasis added);

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (emphasis added). See also, California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 281 (1987) (plurality opinion); Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir.), *cert. denied* 522 U.S. 963 (1997).

The Ohio statute at issue here in no way requires or encourages discrimination in contravention of Title VII. Instead, the statute only limits state remedies, precluding discharged employees to whom arbitration is available from bringing claims for discriminatory discharge under a state statute.

None of the cases cited in Section I of the Petition is relevant to this case. None of the cases discusses or analyzes pre-emption of a state civil rights statute by federal law. More specifically, none of the cases analyzes preemption of a state civil rights statute which on its face limits access to courts. Instead, the cases hold that the existence of a grievance and arbitration provision in a collective bargaining agreement cannot, without a clear and express waiver, preclude an employee from bringing discrimination claims. Neither the Trial Court nor the Court of Appeals held that the arbitration provision in the applicable Collective Bargaining Agreement bars Petitioner's claim. Rather, the lower courts held that a state civil rights statute, ORC § 4112.14(C), bars his claims. This critical distinction defeats Petitioner's argument.

III. ORC § 4112.14(C) IS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT BECAUSE IT MAKES NO DISTINCTION BETWEEN UNION AND NON-UNION EMPLOYEES.

Petitioner exaggerates both the impact of the Court of Appeals' decision in this case and the scope of its holding. First, as set forth above, the decision does not impact "tens of thousands of other unionized workers in Ohio," because it is unpublished and therefore only binding between Petitioner and UPS. Therefore, this decision will not chill union activity,

and it has no far-reaching impact. More importantly, the Court of Appeals' construction of ORC § 4112.14(C) does not penalize employees choosing to unionize.

In contrast to this case, all of the precedent cited in Section II of the Petition analyzes state laws which on their face penalized only unionized employees. The Wisconsin statute at issue in Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951), was struck down because it prohibited post-impasse strikes by certain unionized employees, in direct contravention of the National Labor Relations Act. Likewise, the statute struck down in Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), penalized unionized employees for filing unfair labor practice charges by prohibiting collection of unemployment benefits. The policy struck down in Livadas v. Bradshaw, 512 U.S. 107 (1994), non-enforcement of a California wage law if employees and employers were covered by a collective bargaining agreement containing an arbitration clause, also treated employees choosing to unionize less favorably than those not unionized.

In Livadas, this Court distinguished the policy before it -- a policy that on its face distinguished between union and non-union employees -- from the statute at issue in Ft. Halifax Packing v. Coyne, 482 U.S. 1 (1987). In Ft. Halifax Packing, this Court held that a Maine statute allowing employees and employers to contract for plant-closing severance payments other than those mandated by state law was not pre-empted by federal law. As this Court stated in Livadas,

> Most fundamentally the Maine law [was not pre-empted because it] treated all employees equally whether or not represented by a labor

> organization. All were entitled to the statutory severance benefit, and all were allowed to negotiate agreements providing for different benefits.

Livadas, 512 U.S. at 131 (emphasis added).

The statute at issue here is remarkably similar to the statute at issue in Ft. Halifax Packing. Both statutes allow employers and employees to maintain agreements which result in the unavailability of state statutory rights. Unlike the policy at issue in Livadas, ORC § 4112.14(C) does not make a distinction based on union status. In accordance with Ft. Halifax Packing, ORC § 4112.14(C) is not pre-empted.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied. First, Mr. Hopkins waived the arguments in his Petition by failing to raise them in either the Trial Court or the Court of Appeals. Furthermore, ORC § 4112.14(C) is not pre-empted because it neither conflicts with federal law nor penalizes unionized employees. The Petition fails either to demonstrate any conflict in decisions or to raise any important federal question that has not already been settled by this Court.

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